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2 LAW OFFICES OF STEPHEN SHAIKEN
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7 Attorney for Petitioner Van Hung Vi

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO

11 Van Hung Vi,
12 Petitioner,

13 vs.

14 Nancy Alcantar, Field Office Director,
15 United States Immigration and
16 Customs Services (USICE),
17 Janet L. Myers, Assistant Secretary
18 and Michael Chertoff, Secretary,
19 Department of Homeland Security

20 Respondents

21 District Ct. No.:
22 Agency No.: A21 508 838

23 PETITION FOR
24 WRIT OF HABEAS CORPUS

25 [28 U.S.C. §2241]

26 TO THE ABOVE ENTITLED COURT AND TO RESPONDENTS:

27 PLEASE TAKE NOTICE that petitioner, Van Hung Vi, hereby petitions this Court for a writ
28 of habeas corpus, freeing him from the custody of respondents, because said custody is unauthorized and
violates petitioner's Constitutional right to due process of law. Petitioner is a citizen and national of
Vietnam, who is under a final order of deportation but cannot be deported to his home country of Vietnam
because that nation will not accept him. He has been under an order of supervised release for many
years. He has been charged with a federal criminal offense and wishes to challenge his detention on the
criminal charges and seek release on bail, but is unable to do so because respondents have placed a hold
or detainer on him. As is set forth herein, there is no legal basis to do so and the hold should be released
or petitioner told why the hold, has been placed and afforded an opportunity to challenge it.

This petition is supported by the attached versified petition for writ of habeas corpus, the attached
memorandum of points and authorities, the attached exhibits, and such evidence as may be adduced

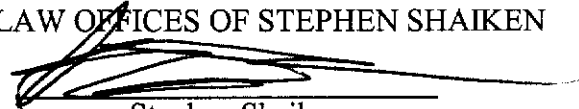
1 during these proceedings.

2 Dated: October 30, 2007 at San Francisco, California

3 Respectfully submitted,

4 LAW OFFICES OF STEPHEN SHAIKEN

5 By


Stephen Shaiken

1 Stephen Shaiken, Esq. Bar No. 90915
2 LAW OFFICES OF STEPHEN SHAIKEN
3 170 Columbus Avenue, Suite 100
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7 Attorney for Petitioner Van hung Vi

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO

11 In re
12 Van Hung vi

13 Petitioner,

14 vs.

15 Nancy Alcantar, Field Office Director,
16 United States Immigration & Customs
17 Enforcement; Janet L. Meyers, Assistant
18 Secretary, and Michael
19 Chertoff, Secretary, Department of
20 Homeland Security,

21 Respondents

22 District Ct. No.:
23 Agency No. A21 508 838

24 **VERIFIED PETITION FOR
WRIT OF MANDATE**

25 **[28 U.S.C. §2241]]**

26 Comes now the petitioner, Van Hung Vi, who alleges as follows:

27 **I**

28 Petitioner is a citizen and national of Vietnam, who entered the United States as a refugee in 1979 and upon information and belief was granted lawful permanent resident status in 1982. Upon information and belief, he was ordered removed from the United States sometime after 1987 because of a Canadian drug conviction and has since been under an order of supervised release by United States Immigration and Customs Enforcement (USICE) and their predecessor, the Immigration and Naturalization Service (INS)

II

Respondent Alcantar is the Field Office Director of the San Francisco office of USICE, a division of the Department of Homeland Security (DHS) and as such, has the exclusive jurisdiction in the

1 Northern District of California to place and remove detainers and holds and to set release conditions for
2 aliens such as petitioner who are under a final order of deportation but cannot be deported.

3 III

4 Respondent Michael Chertoff is the Secretary of Homeland Security, and in that capacity, is the
5 ultimate authority within the Department of Homeland Security (DHS). DHS, through its subagencies,
6 adjudicates applications for visas and citizenship, enforces removal orders, and arrests aliens who are
7 unlawfully within the United States, and refers them for removal proceedings. USICE is a subagency of
8 DHS.

9 Respondent Janet L. Meyers is the Assistant Secretary of DHS for USICE and is the highest
10 ranking official of that subagency of DHS.

11 IV

12 On February 22, 2007, petitioner was charged by indictment in the Eastern District of California
13 with one count of violating 21 U.S.C §846 and one count of violating 21 U.S.C. § 841(a)(1). The
14 allegations are that he was involved in illegal cultivation of marijuana.

15 The Government sought detention and petitioner is currently incarcerated at the Sacramento
16 County Jail.

17 Upon his arrest, USICE placed a detainer or hold on petitioner. As a result of this hold, he could
18 not be released from custody after a bond would be set, and instead would be remanded to the direct
19 custody of ICE. This would of course interfere with his ability to defend himself in the criminal
20 proceedings and would also inconvenience the district court and the prosecution. Therefore, petitioner
21 is unable to proceed with a hearing challenging his detention, as it would not result in his release.
22 Additionally, having a hold, where there is no reason, would prejudice him in his detention hearing.

23 Upon information and belief, his four co-defendants have been released on property bonds.

24 V

25 The United States Supreme Court has held that where an alien is under a final order of deportation
26 or removal and their country will not accept them, they cannot be indefinitely detained. In response to
27 the Supreme Court holding, the Government has promulgated regulations to assess when release is

1 appropriate and upon what conditions. However, the United States Court of Appeals has held that these
2 regulations are ultra vires when applied to aliens whose removal is not reasonably foreseeable. Petitioner
3 is such an alien as Vietnam will not accept him.

4 VI

5 Although the regulations do not apply to petitioner, he nevertheless sought to be released by
6 contacting the local USICE office in San Francisco, which has jurisdiction over cases in the Northern
7 District of California, and proposed a modest bond if that would cause the hold to be lifted. As of this
8 date, USICE has not responded

9 VII

10 Petitioner has a Constitutional right to due process of law under the Fifth Amendment, and a
11 Constitutional right to reasonable bail under the Eighth Amendment. The actions of USICE, in
12 improperly placing a hold on him without legal authority, and in refusing to explain the hold or to respond
13 to a request to be released, all violate these Constitutional guarantees.

14 IX

15 This Court is the appropriate court to file this writ as the relevant USICE office, which has
16 authority over detainers and holds, is located in the Northern District of California in San Francisco.

17 X

18 Habeas corpus is the appropriate remedy and is in fact the only available remedy and the Supreme
19 court has held that habeas is available to seek release in this very situation.

20 Petitioner is without any other form of relief.

1 **WHEREFORE**, petitioner prays as follows:

- 2 1.) That this Court grant the writ of habeas corpus, and compel respondents to release
3 petitioner or in form him of the legal and factual basis for the hold and afford him an
4 opportunity to respond;
5 2.) In the alternative, order respondents to show cause why the writ should not issue;
6 3.) For such other relief as this court deems just and proper.

7 Dated: October 30, 2007 at San Francisco, CA

8 Respectfully submitted,

9 THE LAW OFFICES OF STEPHEN SHAIKEN

10 By: 

11 **VERIFICATION**

12 I, Stephen Shaiken, declare:

13 I am an attorney at law, duly admitted to practice before this court. I am attorney of record for
14 petitioner. Petitioner is incarcerated outside of the county where I maintain my office, and for that
15 reason, I verify this petition on his behalf. I have reviewed the record below, the allegations and
16 arguments herein and believe them to be true.

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Dated: October 30, 2007 at San Francisco, CA

19 
20 Stephen Shaiken, Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner is a citizen and national of Vietnam who is subject to a final order of removal but who cannot be removed. He has been charged with a pending criminal offense, and USICE placed a detainer on him. As a result, he is prevented from seeking a meaningful release on bond during the pendency of his case. The detainer is not authorized by statute or regulation and petitioner has been unable to obtain any information as to why it has been placed or what he can do to have it lifted.

Detained aliens subject to a final order of removal where there is no reasonable likelihood of release may seek release at any time. 8 C.F.R. §241.4(i)(7). When an alien is detained subject to a final order of removal, the Department of Homeland Security/Immigrations and Customs Enforcement has six months from the date of the final order to detain an alien where there is a reasonable possibility of removal. 8 C.F.R. §241.13(b)(2)(ii) [standards for determining reasonable foreseeability of removal are set forth at 8 C.F.R. §241.13(f) The regulations also allow for detention where an alien is a threat to national security or has committed a crime of violence. 8 C.F.R. §241.14.

These regulation were promulgated after the United States Supreme Court held in Zavdvvydas v. Davis, 533 U.S. 678, 687-88, 121 S.Ct. 2491, 2497-98 that an alien subject to a final order of removal where there is no reasonable foreseeability of removal may challenge indefinite detention by way of petition for writ of habeas corpus as the writ was not abolished for such challenge. See also Ali v. Gonzalez, 421 F.3d 795, 797 99th Cir. 2005) [while AEDPA and IIRAIRA have abolished habeas where it challenge a final order of removal, challenge outside the order are allowed)

The regulations cited above contain a procedure by which an alien who is being detained while awaiting execution of a final order of removal and who believes there is no foreseeable possibility of removal may seek release by writing to the DSHQPOD, a special unit established for such matters. However, the Ninth Circuit has held that these regulations are ultra vires when applied to aliens who have no foreseeable possibility of removal, as the statutes governing removability address only instances where there is a foreseeable possibility. Tuan Thai v. Ashcroft, 366 F.3d 790; reh. den. 389 F..3d 967 (9th Cir. 2004) In this case, petitioner has already been found to be an alien whose removability is not reasonably foreseeable, and was released accordingly. Therefore, the regulations do not apply to him.

1 Nevertheless, petitioner has attempted to find out why there is a hold and has offered to post a
2 reasonable bond if appropriate. Petitioner has been charged with a non violent offense to which he has
3 plead not guilty. He wishes to challenge detention in the criminal case and seek bond, but it is pointless
4 to do so as if he posts bond he will not be released but will be remanded to the custody of ICE because
5 of the hold.

6 Petitioner satisfies the custody requirement for habeas corpus because where there is a final order
7 of removal and detention, there is custody for purposes of habeas corpus. Guti v. INS, 908 F.2d 995 (9th
8 Cir. 1990) Petitioner also satisfies the legal basis for habeas, as the unexplained and apparently
9 unauthorized detainer violates his right to due process of law in that he is deprived of liberty without
10 notice or fair procedure to seek release, and it also violates his constitutional right to reasonable bail in
11 the criminal case.

12 CONCLUSION

13 Petitioner, as a citizen and national of Vietnam, is a person whose removal is not reasonably
14 foreseeable. He has been under an order of supervised release. The detainer is without authorization.
15 Petitioner should not be subject to a detainer.

16 Dated October 30,, 2007

17 Respectfully submitted,

18 THE LAW OFFICES OF STEPHEN SHAIKEN

19 By:

20 
Stephen Shaiken, Esq.

EXHIBIT A

Case 2:07-cr-00059-LKK Document 18 Filed 02/22/2007 Page 1 of 4

McGREGOR W. SCOTT
United States Attorney
MARY L. GRAD
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2763

FILED

FEB 22 2007

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

207 - CR - 0059

UNITED STATES OF AMERICA,

CR. NO.

Plaintiff,

VIOLATIONS: 21 U.S.C. §§ 846 and
841(a)(1) - Conspiracy to
Manufacture and Possess With
Intent to Distribute Marijuana;
21 U.S.C. § 841(a)(1) -
Manufacture of Marijuana

v.

VAN HUNG VI,
IVY JUNG TRAN,
VAN HY VI,
VAN DAT VI, and
TOMMY LY,

Defendants.

I N D I C T M E N T

COUNT ONE: [21 U.S.C. §§ 846 and 841(a)(1) - Conspiracy to
Manufacture and Possess With Intent to Distribute
Marijuana]

The Grand Jury charges: T H A T

VAN HUNG VI,
IVY JUNG TRAN,
VAN HY VI,
VAN DAT VI, and
TOMMY LY

defendants herein, beginning at a time unknown to the Grand Jury,
but no later than in or about January 2007, and continuing
thereafter to on or about February 7, 2007, in the State and Eastern

Case 2:07-cr-00059-LKK Document 18 Filed 02/22/2007 Page 2 of 4

1 District of California, and elsewhere, did knowingly and
2 intentionally conspire with each other and with other persons
3 unknown to the Grand Jury, to manufacture and to possess with intent
4 to distribute at least 1000 marijuana plants, a Schedule I
5 controlled substance, in violation of Title 21, United States Code,
6 Sections 846 and 841(a)(1).

7 COUNT TWO: [21 U.S.C. § 841(a)(1) - Possession with Intent to
8 Distribute Marijuana]

9 The Grand Jury further charges: T H A T

10 VAN HUNG VI,
11 IVY JUNG TRAN,
12 VAN HY VI,
13 VAN DAT VI, and
14 TOMMY LY ,

15 defendants herein, on or about February 7, 2007, in the State and
16 Eastern District of California, did knowingly and intentionally
17 possess with intent to distribute at least 100 marijuana plants, a
18 Schedule I controlled substance, in violation of Title 21, United
19 States Code, Section 841(a)(1).

20 A TRUE BILL.

21 
22 FOREPERSON

23 
24 MCGREGOR W. SCOTT
25 United States Attorney
26
27
28

EXHIBIT B

LAW OFFICES OF STEPHEN SHAIKEN

170 COLUMBUS AVE, SUITE 100
SAN FRANCISCO, CALIFORNIA 94133-5102
(415) 248-1012
FAX (415) 248-0019

May 29, 2007

Juan Bustos, Supervisor
U.S. Department of Homeland Security
Immigration & Customs Enforcement
Deportation & Detention
630 Sansome Street, Fifth Floor
San Francisco, Ca 94111

Re: Van Hung Vi
A21 508 838

Dear Officer Bustos:

We are informed that you are the officer responsible for the supervision of the above-referenced alien. If this is not the case, please present this letter to the appropriate officer or inform us of the name of that person and we will contact them directly.

This office represents Mr. Vi, and our G-28 is attached.

Mr. Vi is currently in custody in the Sacramento County Jail based on pending federal charges for marijuana cultivation. He has plead not guilty. He is unable to post bail on the federal case because of the hold placed by ICE.

Mr. Vi has long been under an order of supervision because he is removable but cannot be removed to Vietnam as that nation does not accept its own citizens who have been ordered removed.

Mr. Vi's criminal record in the U.S. consists of a 1983 manslaughter conviction when he was a juvenile and for which he was sentenced to the California Youth Authority at age seventeen. His only other conviction in the U.S. was a 2002 conviction for driving under the influence. He was arrested in 1986, 1987, and 1991, but those arrests all resulted in dismissals. He was granted diversion in a separate, which he successfully completed in 1999.

Mr. Vi was convicted of a drug offense in Canada in 1987, for which he was sent to prison, and which resulted in a deportation order in the U.S., which caused him to be placed on supervision.

Mr. Vi came to the U.S. from Vietnam with his family in 1979 as refugees, and was granted permanent residence in 1982.

Letter to ICE
Re: Van Hung Vi A21 508 838
May 29, 2007
Page Two

Mr. Vi is the father of a sixteen year old girl who lives in New York and from whom he provides support. His mother is a U.S. citizen, and he has four siblings in this country, three of whom are citizens and one of whom is a permanent resident.

All of the above facts should be substantiated by his A file, but if you need proof of any of these matters, feel free to contact this office.

Mr. Vi is eligible for release under the analytical framework set forth by the U.S. Supreme Court in Zadvydas v. Davis, 533 U.S. 678 (2001), requiring 90 day reviews of aliens who are in custody after having been removed but whose home country will not accept them. Although he has a criminal record, he currently poses neither a flight risk nor a danger to the community.

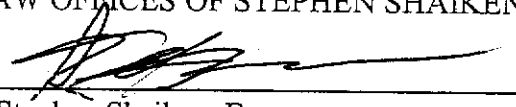
Mr. Vi would be willing to post bond as a condition of lifting the hold and to ensure his cooperation on supervision. He would also accept other reasonable conditions.

Please contact the undersigned to discuss this matter as soon as possible.

Very truly yours,

By:

THE LAW OFFICES OF STEPHEN SHAIKEN


Stephen Shaiken, Esq.

SS:cn
enc

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Entry of Appearance as Attorney or Representative

Appearances - An appearance shall be filed on this form by the attorney or representative appearing in each case. Thereafter, substitution may be permitted upon the written withdrawal of the attorney or representative of record or upon notification of the new attorney or representative. When an appearance is made by a person acting in a representative capacity, his personal appearance or signature shall constitute a representation that under the provisions of this chapter he is authorized and qualified to represent. Further proof of authority to act in a representative capacity may be required. **Availability of Records** - During the time a case is pending, and except as otherwise provided in 8 CFR 103.2(b), a party to a proceeding or his attorney or representative shall be permitted to examine the record of proceeding in a Service office. He may, in conformity with 8 CFR 103.10, obtain copies of Service records or information therefrom and copies of documents or transcripts of evidence furnished by him. Upon request, he/she may, in addition, be loaned a copy of the testimony and exhibits contained in the record of proceeding upon giving his/her receipt for such copies and pledging that it will be surrendered upon final disposition of the case or upon demand. If extra copies of exhibits do not exist, they shall not be furnished free on loan; however, they shall be made available for copying or purchase of copies as provided in 8 CFR 103.10.

In re: Van Hung Vi

Date: 5/29/07

File No. A21 508 838

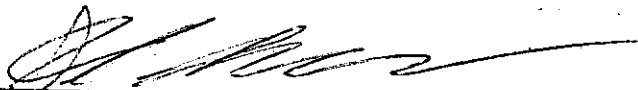
I hereby enter my appearance as attorney for (or representative of), and at the request of the following named person(s):

Name: Van Hung Vi		<input type="checkbox"/> Petitioner	<input checked="" type="checkbox"/> Applicant
Address: (Apt. No.) (Number & Street)		<input type="checkbox"/> Beneficiary	
ICE hold-	in custody-Sacramento County Jail	(City)	(State) (Zip Code)
Name:		<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
Address: (Apt. No.) (Number & Street)		<input type="checkbox"/> Beneficiary	
		(City)	(State) (Zip Code)

Check Applicable Item(s) below:

- ☒ 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia
California Supreme Court and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law.
- ☐ 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:
- ☐ 3. I am associated with _____ the attorney of record previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.)
- ☐ 4. Others (Explain Fully.)

SIGNATURE



COMPLETE ADDRESS
170 Columbus Avenue, Ste. 100
San Francisco, CA 94133

NAME (Type or Print)

Stephen Shaiken, Esq.

TELEPHONE NUMBER

415 248 1012

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS:

(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSURE IS IN CONNECTION WITH THE FOLLOWING MATTER:

Name of Person Consenting

Signature of Person Consenting

Date

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is contained in 8CFR 103.10 and 103.20 ELSEQ

EXHIBIT C

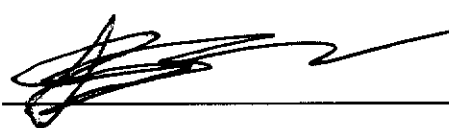
DECLARATION OF COUNSEL

I, Stephen Shaiken, declare:

- 1.) I am an attorney at law, duly admitted to practice before this Court. I am attorney of record for petitioner on this petition.
- 2.) I make this declaration upon personal knowledge, except where stated upon information and belief, and as to those matters, I believe them to be true. If called to testify as a witness i would testify as is set forth herein.
- 3.) The same is true as to the averments in the petition.
- 4.) Attached as Exhibit A is a copy of the indictment in petitioner's criminal case pending in the Eastern district of California, Sacramento.
- 5.) Attached as Exhibit B is a letter I wrote to the deportation officer I was told was assigned to petitioner's case. I was given this information by the duty officer at USICE in San Francisco when I called. I sent the letter because my calls were not returned. I have never received a response to the letter.

I declare under penalty of perjury that the forgoing is true and correct.

Dated August 15, 2007 at San Francisco, CA


Stephen Shaiken, Esq.